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U.S. Citizenship
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Services

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JUN 13 2005

FILE:

WAC 03 217 53219

Office: CALIFORNIA SERVICE CENTER

Date:

IN RE:

Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained and the petition will be approved.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner is a postdoctoral researcher at the University of California, Davis (UCD). The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer.

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Counsel describes the petitioner's work:

[The petitioner] has received many prestigious accolades for her work in the field of animal nutrition, especially aquaculture as it relates to fish nutrition. . . .

[The petitioner] has more than fifteen years of biological research experience. She has already contributed significantly to the restoration of endangered fish species in the United States and will continue to conduct scientific research to develop methods to combat the depletion of fisheries and other aquacultural resources in the United States. . . .

As the proffered evidence confirms, [the petitioner] has spent a great deal of time and energy on cutting-edge fish biological research. . . . [The petitioner's] important work will make critical contributions to humankind's fight to preserve endangered marine species, particularly ancient species such as the Sturgeon. Furthermore, [the petitioner's] research work on the analysis of the 2D and 3D structures of transporter proteins . . . will continue to be critical for anti-cancer drug design, cancer treatment and many other transporter-related diseases.

Counsel repeatedly stresses that the petitioner "has published over 20 peer-reviewed articles in journals of international prominence and proceedings of international conferences." Counsel concludes that the petitioner has shown that she "is not merely more qualified in her field, but that she is the most qualified in her field."

The petitioner submits several witness letters. [REDACTED] who briefly employed the petitioner as a postdoctoral assistant at Mississippi State University, states that the petitioner "is one of the most talented young scientist[s] in the U.S. today. She has already made several significant contributions to the development of aquaculture in the U.S. and I expect that she will continue to do so if given the opportunity." [REDACTED] of UCD's Center for Aquatic Biology and Aquaculture, states that the petitioner "has displayed the best characteristics of an up-and-coming, world-class scientist." In [REDACTED] own laboratory, the petitioner "worked out several useful surgical techniques" to facilitate study of the white sturgeon. [REDACTED] claims that the petitioner has earned "world-wide recognition for her work."

██████████ director of research at Deakin University's School of Ecology & Environment in Victoria, Australia, supervised the petitioner's training when the petitioner "was a young researcher at the Zhongshan University, and involved in a research program funded by the International Development Research Centre (Canada)." ██████████ states that the petitioner has established "her name as a leading young fish nutritionist." ██████████ describes one of the petitioner's present projects:

The heavy contamination of selenium in the San Francisco Bay-Delta has been speculated to be one of the major reasons that have threatened[ed] this species [the splittail]. She is currently attempting to determine the selenium (Se) burden in tissue and perform Se speciation of the splittail reproductive system in laboratory feeding studies so that a better understanding of the toxic mechanism of Se can be required [sic]. Such understanding can lead to the development of better Se indicators for toxic impact in wild populations. This work will be critically important to establishing reliable regulatory criteria for Se in California's waterways and elsewhere where Se contamination occurs.

None of the witnesses indicate that the petitioner has done any work with transporter proteins, or that the petitioner's findings could lead to anti-cancer drugs. This reference appears to have been accidentally incorporated from language prepared for another of counsel's clients.

While we note that some of the witnesses assert that the petitioner has earned an international reputation, all of the witnesses have taught or supervised the petitioner, with the exception of one witness who has known the petitioner for over ten years, but does not specify how they first met.

The petitioner submits copies of her published articles, as well as pages from *Journal Citation Reports* showing the impact factors of the journals in which her work has appeared. The petitioner also submits printouts showing that three of her articles have been cited an aggregate total of 17 times, eight of which are self-citations by the petitioner and/or her collaborators. The petitioner's most-cited article has 11 citations, four of them self-citations by the petitioner and/or her collaborators.

The director instructed the petitioner to submit additional evidence, from independent sources, to establish that the beneficiary offers a prospective benefit to the United States that significantly exceeds that usually offered by scientists in her field. In response, the petitioner submits additional letters, documents, and arguments from counsel.

██████████ chief of the Lower Great Lakes Fishery Resources Office of the U.S. Fish and Wildlife Service, states:

I don't know [the petitioner] personally, but I have had the opportunity to review her research accomplishments in the United States, and she has performed exceptionally well compared to other young scientists in her field. . . .

One of her research works, that I'm most familiar with, will have tremendous impact on my agency's ability to successfully restore the threatened splittail . . . whose population has plummeted since the 1980s.

██████████ of Texas A&M University indicates that his personal interactions with the petitioner have been limited to brief encounters at professional gatherings. ██████████ states that the

petitioner's "research on carbohydrate metabolism of sturgeon has substantially advanced our understanding of this important area of nutrition. . . . I believe [the petitioner's] research has been outstanding."

[redacted] of the Aquaculture Research Center at Kentucky State University states:

I know [the petitioner] from her publications and her presentations at national and international aquaculture conferences, and through the people who work with her. . . .

I know that [the petitioner] is incredibly talented and has made significant advances in her research field. . . . [S]he has developed a new and innovative technique to determine nutrient utilization in white sturgeon, a species of fish native to the U.S. Further, she has recently been active in evaluating spawning, nutrition, and culture techniques for the endangered U.S. fish called the splittail. Her nutrition research techniques used in the care and maintenance of this species have been used by personnel at the California Department of Fish and Game so that they can use her information to better culture and propagate this fish.

The petitioner submits updated citation information, indicating that her work has been cited 25 times. The new information does not distinguish between self-citations and independent citations. The record shows that more than half of the 17 citations claimed initially are self-citations.

In denying the petition, the director acknowledged that "the petitioner has a relative degree of expertise and perspective in the area of Aquaculture / Fish Nutrition / Toxicology" and that her work "will positively impact the lives of millions of Americans." The director determined, however, that the petitioner has "failed to establish that the national interest would be adversely affected if a labor certification were required for herself." The director also asserted that "some [of the witness letters] appear to be more akin to reference letters than to testimonials to her individual potential benefit to the country on a national impact level." The director concluded that counsel's assertions regarding the importance of the petitioner's work "are made without benefit of any objective evidence."

On appeal, counsel asserts that the petitioner has submitted two letters "from high-ranking experts at the U.S. Department of the Interior" (counsel's emphasis). The individuals in question are local officials of the Fish and Wildlife Service, and therefore counsel's description (which implies high rank at the departmental level) is somewhat exaggerated. Nevertheless, counsel is correct in observing that several of the witnesses are clearly not the petitioner's close collaborators. Indeed, the director stated only that "some" of the petitioner's letters are "akin to reference letters." The director did not address the merits of the several clearly independent letters submitted in support of the petition. It is true that some of the letters do little more than state the importance of the petitioner's *area* of research, which is a weak foundation for a national interest waiver claim, but other letters unequivocally indicate that the petitioner, in particular, has been responsible for highly important findings and is considered a leader in her specialty.

Counsel states that "the nature of a career in scientific research" involves "relocating to different universities/companies and different positions," which labor certification does not permit. This particular argument fails for various reasons. First of all, because this argument derives from "the nature of a career in scientific research," counsel is basically arguing that *no* scientific researcher should be held to the labor certification requirement. The statute, however, contains no such blanket waiver for scientists. We have no authority to second-guess Congressional intent, or to assume that Congress meant to exempt all scientific researchers but simply neglected or forgot to do so. Finally, the argument that the petitioner should be free to

change jobs at any time cancels out the argument that her continued involvement with particular projects is critical.

The petitioner's citation record, of perhaps a dozen or so independent citations of her work, is not impressive on its face. That being said, while citations can be a compelling objective indicator of a researcher's influence, they are not the only means to gauge such influence. As noted above, attestations to the use and implementation of the petitioner's findings are not limited to her professors and mentors. The materials in the record give us cause to believe that the petitioner's work has attracted very positive notice well beyond her own circle of collaborators and employers.

Given that a range of independent experts have attested that the petitioner, beyond others in her field, offers special benefits to the United States, we may therefore conclude that these benefits outweigh the national interest inherent in the labor certification process.

It does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given field of research, rather than on the merits of the individual alien. That being said, the above testimony, and further testimony in the record, establishes that the aquacultural research community recognizes the significance of this petitioner's research rather than simply the general area of research. The benefit of retaining this alien's services outweighs the national interest that is inherent in the labor certification process. Therefore, on the basis of the evidence submitted, the petitioner has established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

ORDER: The appeal is sustained and the petition is approved.